



- (ii) winding up petition and supporting affidavits of Kevin Vaifo'ou and John Paul Chapman filed on 30 September 2013 deposing that sums of TOP\$5400.00, TOP\$2875.00 and TOP\$26,780.89 were owed to the First, Second and Third Petitioners respectively by the Respondent;
- (iii) email received by the solicitors for the Respondents on 14 June 2013 apparently conceding a debt of TOP\$58,400 to the Second Petitioner;
- (iv) application to strike out the Petition filed by the Respondent together with supporting affidavit of Neil Jenkin, a director of the Respondent, given notice of a counterclaim amounting to TOP\$100,000;
- (v) affidavit of supporting creditor Westpac Bank filed on 12 November 2013 exhibiting statutory demand served on the Respondent on 24 June 2013 demanding payment of TOP\$9946 owed by the Respondent, also exhibiting a letter from Neil Jenkin apparently acknowledging the debt and also averring that the debt had not been discharged;
- (vi) affidavit of John Paul Chapman filed on 19 November 2013 rejecting the Respondent's counterclaim and describing the same as "a concoction";
- (vii) affidavit of supporting creditor 'Atunaisa Tu'itupou Takau alleging an unpaid debt of TOP\$7800 filed on 26 November 2013;
- (viii) copy of judgment in the amount of TOP\$41,464.00 entered against the Respondent on 15 November 2013 filed by Mr. Edwards on 26 November 2013;
- (ix) written submissions filed by Mr. Edwards on 28 November 2013;

- (x) affidavit of Neil Jenkin sworn and filed on 6 February 2014 acknowledging the Judgment debt and the debt to the Westpac Bank but denying owing anything to Mr. Takau;
  - (xi) written submissions filed by Mrs. Tupou on 7 February 2014.
- [3] Mr. Edwards conceded that owing to the 30 day limitation imposed by Section 297 (1) of the Act the Petitioning creditors could not rely on the Respondent's failure to comply with the statutory demand served on 14 June 2013. Instead he relied on Section 297 (2) and submitted that it was plain on the evidence before the Court that the Respondent was unable to pay its debts.
- [4] Mrs. Tupou, on the other hand, submitted that "inability to pay debts" is defined in Section 296 subsections (a) to (d). Since Section 297 (1) excluded (2) and it was not alleged that the events described in (b), (c) or (d) had occurred therefore it had not been shown that the Respondent was unable to pay its debts. She also relied on the fact that no liquidator had been named and on the counterclaim raised by Mr. Jenkin.
- [5] With respect, it is my opinion that Section 296 has been misread by Mrs. Tupou. This is perhaps understandable since the marginal note is clearly misleading (as to which see e.g *Sutton v Sutton* (1883) 22 Ch.D. 511 and *Uddin & Associated Portland Cement Manufacturers Ltd* [1965] 2 QB 582. Rather than exclusively describing the condition of inability to pay debts, the section lists the four circumstances in which such inability maybe *presumed* "unless the contrary is proved" i.e. under Section 297 (2).

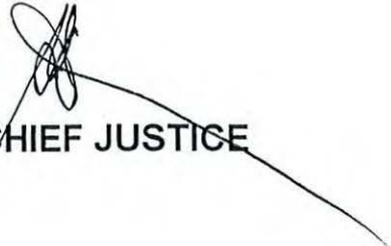
- [6] While it is correct that no liquidator has actually been named, I see no objection to an order being made under Section 250 (1) suspended but to take effect on the name of the proposed liquidator being supplied.
- [7] The alleged counterclaim (not really a “counterclaim” in law since no action has been commenced against the company) raises the question of what it is that the Petitioners are required to prove under Section 297 (2).
- [8] In a Decision dated 15 November 2013 (CV69 of 2013) I stated that in these circumstances the company, when faced with the evidence of debts, had to prove that it was able to pay the statutory minimum of TOP\$1000 specified by the Companies Liquidation Regulations 1999. I now accept that this statement of the law was incorrect. As explained in “Principles of Corporation Law” Ford & Austin 7<sup>th</sup> Edn para 20.610 the basic question is whether the company’s business is viable: “a company may have an excess of assets over liabilities but its assets may not be readily realizable payment of debts as they fall due”. “The Court’s task is to decided whether the company is suffering from a temporary lack of liquidity in which case it is not insolvent (*Bank of Australia v Hall* (1907) 4 CLR 1514) or an endemic shortage of working capital (*Hymix Concrete Pty Ltd v Garrity* (1977) 13 ALR 321 or 328”.
- [9] In the present case substantial debts are admitted. Repayment is conditional on hoped for receipts from a possible sale of a car, of a boat and from a Ms Liz Sullivan. A disputed claim of TOP\$100,000 for improvements is also adumbrated. In my opinion the Respondent

has not discharged the onus resting upon it to prove its viability. According, there will be an order that the company be put into liquidation upon the name of the liquidator being provided to the Court by the Petitioners.

[10] I will hear counsel as to costs.

**DATED: 14 February 2014.**



  
**CHIEF JUSTICE**

E. Takataka

13/2/2014